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UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN RE ELECTRONIC SURVEILLANCE AND
PHYSICAL SEARCH OF FOREIGN POWERS AND
AGENTS OF FOREIGN POWERS (U)

Docket Number: [REDACTED]

MEMORANDUM OPINION

This matter is before the Court on the government's motion, filed October 2, 2008, to amend previous Orders and Warrants of this Court to incorporate amendments to the Federal Bureau of Investigation (FBI) Standard Electronic Surveillance and Physical Search Minimization Procedures. These amendments to the standard minimization procedures were adopted by the Attorney General, on October 2, 2008.

The amendments adopted by the Attorney General authorize the National Counterterrorism Center (NCTC) to review specific categories of information obtained pursuant to the Foreign Intelligence Surveillance Act of 1978, as amended, 50 U.S.C. §§ 1801-1811, 1821-1829 (FISA) that the FBI has entered into its Automated Case Support (ACS) database and to disseminate such information in accordance with a set of NCTC standard minimization

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procedures, which are on file with this Court.¹ Specifically, the amendments add to each set of FBI standard minimization procedures the following:²

Access by the National Counterterrorism Center to the FBI's Automated Case Support (ACS) Database (S)

Notwithstanding any other provision of these procedures, the FBI may grant the National Counterterrorism Center (NCTC) access to its Automated Case Support (ACS) database, provided that such access is limited to classifications of cases that are likely to contain information related to terrorism or counterterrorism. NCTC's access to ACS is contingent upon NCTC's application of the National Counterterrorism Center Standard Minimization Procedures for Information Received from the Federal Bureau of Investigation, which are on file with the Court. If the FBI authorizes NCTC to disseminate any information NCTC receives pursuant to this section, such authorization shall be made consistent with these procedures and applicable Department of Justice guidance, including but not limited to restrictions governing foreign governments. (S)

The issue presented by the government's motion is whether the FBI standard minimization procedures, with this amendment, still meet the definition of minimization procedures under FISA. Section 1801(h) of FISA provides, in relevant part, that minimization procedures are:

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information

¹ These procedures are captioned "National Counterterrorism Center Standard Minimization Procedures For Information Received from the Federal Bureau of Investigation" and are on file with the Court in Docket Number [REDACTED]

² In those FBI standard minimization procedures governing electronic surveillance, this language is added as Section 6; it is added as Section VI in those FBI standard minimization procedures governing physical search.

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concerning unconsenting United States persons consistent with the need of the United States to obtain, produce and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes;

50 U.S.C. § 1801(h)(1)-(3).³ The Court finds that providing FISA information to NCTC meets the requirements of section 1801(h)(1). As the government states in its motion, "NCTC is the nation's primary organization for analyzing and integrating all terrorism- and counterterrorism-related intelligence possessed or acquired by the United States Government." Gov't Mot. at 6. See also 50 U.S.C. § 404o(d) (setting forth the primary missions of NCTC as including conducting strategic operational planning for counterterrorism activities and serving as the central and shared knowledge bank on known and suspected terrorists and international terror groups). Permitting NCTC to have access to those classifications of cases in ACS that are likely to contain terrorism or counterterrorism information is therefore consistent with the need of the United States to obtain, produce and disseminate foreign intelligence information.

The analysis with respect to sections 1801(h)(2) and (h)(3) is complicated by the fact that

³ Section 1821(4) of FISA defines minimization procedures with respect to physical search in the same way, substituting "physical search" for "surveillance" in section 1821(4)(A). For ease of reference, the Court will refer in this Opinion only to the electronic surveillance provisions of FISA.

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according to the government, although the FISA information in ACS has been minimized pursuant to the FBI standard minimization procedures, ACS nonetheless “almost certainly” contains a small amount of nonpublicly available FISA information concerning U.S. persons that is not and does not reasonably appear to be foreign intelligence information, but has been retained by the FBI because it is evidence of a crime (“non-foreign intelligence criminal information”). Gov’t Mot. at 3. The government asserts that it is not possible to segregate the foreign intelligence information from the non-foreign intelligence criminal information and thus, in order to receive the foreign intelligence information, the NCTC necessarily will receive the non-foreign intelligence criminal information. Id. at 23.

Section 1801(h)(3) provides that such information may be retained or disseminated only for law enforcement purposes. However, the government states in its motion that NCTC will not retain, use, or further disseminate the non-foreign intelligence criminal information. See Gov’t Mot. at 14 (“NCTC has no interest in criminal information without foreign intelligence value.”). Given that NCTC will not be using the non-foreign intelligence criminal information, the dissemination of such information to the NCTC cannot be for a “law enforcement” purpose. Moreover, if the non-foreign intelligence criminal information disseminated to NCTC is not disseminated for purposes of law enforcement, then it does not enjoy the “safe harbor” afforded by section 1801(h)(3) and thus, also could run afoul of section 1801(h)(2).⁴

The Court finds that the amendments adopted by the Attorney General are nonetheless

⁴ Section 1801(h)(2) is implicated because the non-foreign intelligence criminal information may include the identities of U.S. persons.

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consistent with the statutory definition of minimization procedures, because it finds that, in this case, providing NCTC with access to these specific categories of FISA information in ACS does not actually constitute a dissemination. Rather, it is similar to the process the Court approved in Docket Number [REDACTED] (the raw take motion), whereby the agency that is the ultimate recipient of the FISA-acquired information is the party responsible for meeting the statutory requirement to minimize the information. Although the FISA data in ACS has already been “minimized,” the analogy to the raw take motion is apt because the FBI has not configured ACS to enable its users to distinguish foreign intelligence information from non-foreign intelligence evidence of a crime. As a result, the FISA information provided to NCTC through ACS is “raw” in the sense that NCTC users are currently unable to determine whether information retrieved from the system falls into one category or the other. Thus, for the purposes of NCTC, the information contained in ACS is not fully minimized until NCTC analysts have segregated the foreign intelligence terrorist-related information from the non-foreign intelligence evidence of a crime.

The Court finds that the FBI Standard Minimization Procedures coupled with the NCTC FISA Minimization Procedures meet the definition of “minimization procedures” under the statute. The FBI only uploads to ACS such FISA-acquired information that it has determined to be foreign intelligence information or non-foreign intelligence evidence of a crime.

Consequently, the vast majority of non-foreign intelligence information acquired by the FBI through electronic surveillance or physical search under FISA is never provided to NCTC. The application by the NCTC of its minimization procedures is over and above that conducted by the FBI.

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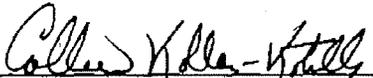
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In addition, the NCTC procedures provide that NCTC's access within ACS is limited to specific case classifications that contain terrorism-related information. Furthermore, the proposed NCTC minimization procedures prohibit NCTC analysts from retaining, using, or disseminating non-foreign intelligence FISA information that is evidence of a crime.⁵ For these reasons, the Court finds the amendments to the procedures consistent with the statute.

For the foregoing reasons, the government's motion is **GRANTED**. An Order is being entered contemporaneously with this Opinion.

Entered this 8th day of October, 2008 in Docket Number 


COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign Intelligence
Surveillance Court

⁵ This prohibition does not violate section 1801(h)(3) because the FBI would, presumably, have already retained and disseminated any non-foreign intelligence FISA information in ACS that is evidence of a crime as part of the FBI's initial minimization of the raw FISA take. The government's minimization procedures as a whole, therefore, would permit the retention and dissemination of such information.

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WASHINGTON, D.C.

IN RE ELECTRONIC SURVEILLANCE AND
PHYSICAL SEARCH OF FOREIGN POWERS AND
AGENTS OF FOREIGN POWERS (U)

Docket Number: [REDACTED]

ORDER

This matter having come before the Court on the motion of the United States to:

(1) apply the Amendments to the Federal Bureau of Investigation Standard Electronic Surveillance and Physical Search Minimization Procedures, adopted by the Attorney General on October 2, 2008 and on file with the Court, to all Orders and Warrants of this Court authorizing electronic surveillance and/or physical search that incorporate those procedures; and (2) amend all other Orders and Warrants of this Court authorizing electronic surveillance and/or physical search consistent with the Amendments, as set forth in the government's motion, the Court finds that: the Amendments proposed in the government's motion have been adopted by the Attorney General, as defined in Title 50, United States Code, Section 1801(g), and meet the definition of

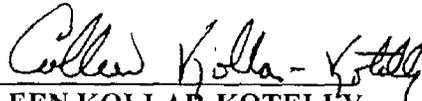
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Derived from: Motion of the United States in
the above-captioned matters
Declassify on: 23 June 2033

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minimization procedures set forth at Title 50, United States Code, Sections 1801(h) and 1821(4); and, for the reasons stated in the Memorandum Opinion issued contemporaneously with this Order, the government's motion is hereby **GRANTED**.

Entered this 8th day of October, 2008 in Docket Number 


COLLEEN KOLLAR-KOTELLY
Judge, United States Foreign Intelligence
Surveillance Court

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